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No. 306

In the Supreme Court of the United States

OCTOBER TERM, 1941

JOSEPHINE S. PEARCE, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 24–25) is reported in 42 B. T. A. 91. The opinions of the Circuit Court of Appeals (R. 33–36) are reported in 120 F. (2d) 228.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 4, 1941. (R. 37.) The petition for a writ of certiorari was filed July 24, 1941, and was granted October 13, 1941. The jurisdiction of this Court is invoked under Section 240 (a)

of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The taxpayer received payments under a standard annuity contract purchased for her by her divorced husband in accordance with a predivorce agreement. Should these payments be included in her gross income?

STATUTES INVOLVED

Revenue Act of 1934, c. 277, 48 Stat. 680:

> SEC. 22. GROSS INCOME.
>
> (a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * * (U. S. C., Title 26, Sec. 22.)

Section 22 (a) of the Revenue Act of 1936, c. 690, 49 Stat. 1648, contains provisions identical with the above.

Vernon's Texas Civil Statutes (1940 Ed.), Vol. 13, Art. 4638:

> The court pronouncing a decree of divorce shall also decree and order a division

of the estate of the parties in such a way as the court shall deem just and right, having due regard to the rights of each party and their children, if any. Nothing herein shall be construed to compel either party to divest himself or herself of the title to real estate.

STATEMENT

The petitioner separated from her husband in 1913. (R. 24.) Both were then living in New York City, and were still living there during the years involved herein. (R. 9, 33.) When they separated, an agreement providing for monthly payments by the husband for the support of the petitioner was executed. This agreement was amended in 1916 by a "Supplemental Agreement". By virtue of this supplemental agreement, the husband agreed to pay the petitioner $500 each month for life, or until termination of the agreement prior to her death. The husband was given the option to terminate the arrangement by purchasing an annuity contract, issued by a recognized life insurance company, calling for the payment of $500 per month to the petitioner for the remainder of her life. (R. 24.)

The petitioner in 1916 went to Texas and there filed a suit for divorce. Her husband entered his personal appearance in the action, and a decree of absolute divorce was entered in 1917. Neither alimony nor any other property settlement was mentioned in the decree. There were no children. (R. 24.)

Shortly after the granting of the divorce, the husband purchased an annuity for the petitioner's benefit from the Travelers Insurance Company of Hartford, Connecticut. This annuity called for the payment of $500 per month to the petitioner for life. (R. 24–25.)

In reporting gross income for 1935 and 1936 neither the petitioner nor her former husband included the $6,000 received by her under the annuity contract in each of those years. The Commissioner sent deficiency notices to both the petitioner herein and her former husband, and both appealed to the Board of Tax Appeals. At the hearing the Commissioner contended that the former wife should report the payments as her income, and the Board sustained this contention. (R. 25.) The petitioner appealed to the court below, which affirmed the decision of the Board (R. 37.)

SUMMARY OF ARGUMENT

I

The rule of *Douglas* v. *Willcuts*, 296 U. S. 1, is an exception to the general principle that the person who physically receives income must pay income taxes thereon. In order to bring herself within this exception, a divorced wife must show by clear and convincing proof that the property settlement effected at the time of the divorce did not give her husband a complete discharge of all liability to continue to contribute to her support.

The purchase of an annuity by the husband for the wife's benefit effects a complete discharge of his obligation, since it is tantamount to a transfer of a lump sum or income producing securities.

If, after the Commissioner has determined that she must report income realized as a result of the divorce settlement, the wife fails to show that her husband was under a continuing liability to support her, she is liable for the taxes claimed. If the divorce settlement gave the husband a complete discharge under state law, or if the state law is uncertain, the Commissioner may properly rely on the general rule that the actual recipient of income must pay the tax. In this case, therefore, the divorced wife was properly held liable.

II

The husband was not subject to a continuing obligation to contribute to his wife's support, under the law of New York, where both parties were residing prior to the divorce and during the period when the income involved herein was received. There is no law in New York which requires a man to contribute to the support of a former wife, where the divorce was obtained in another state and the courts of such other state did not require him to support her.

There is no evidence that, under Texas law, a divorced husband may be required to make contributions to his wife's support after the divorce

has been granted. There is no power to allow permanent alimony. The applicable statute provides for an equitable division of the parties' property at the date of the divorce, but after the judgment has been rendered, the courts apparently may not make a further division or require the husband to contribute in any way to the support of his former wife. Although the law is not entirely clear on this subject, the available authorities indicate that a wife could not require additional support many years after the divorce decree had become final.

Since the petitioner can not prevail without showing by clear and convincing proof that her husband was not discharged, the probability that there was no continuing liability or the uncertainty in this respect indicate that the decision below should be affirmed.

ARGUMENT

I

IF UNDER APPLICABLE STATE LAW MR. PEARCE WAS COMPLETELY DISCHARGED OF ALL LIABILITY TO CONTRIBUTE TO HIS WIFE'S SUPPORT, THE ANNUITY PAYMENTS WERE NOT TAXABLE TO HIM AND SHOULD THEREFORE BE INCLUDED IN THE PETITIONER'S GROSS INCOME

1. The petitioner resists payment of these taxes on the theory that each annuity payment was a *pro tanto* discharge of her former husband's continuing obligation to support her. Consequently, she argues that the payments should be included

in his gross income, not hers. She insists that the rule of *Douglas* v. *Willcuts*, 296 U. S. 1, applies to the situation presented in this case. *Douglas* v. *Willcuts* furnished an exception to the general rule that he who physically receives income must pay the tax thereon. The exception is that each payment which discharges an obligation, no matter who receives it, is treated as the equivalent of income actually received by the obligor. In the *Douglas* case, the obligation being discharged was the husband's legal duty to contribute to his wife's support, continuing even after divorce. Cognate obligations are the duty to support minor children (*Helvering* v. *Schweitzer*, 296 U. S. 551, 665) and to pay taxes (*Old Colony Tr. Co.* v. *Commissioner*, 279 U. S. 716) or a pre-existing debt (*Helvering* v. *Blumenthal*, 296 U. S. 552). Generally the obligation to support a divorced wife is imposed upon a husband by state law, but he may assume the duty voluntarily. His doing so will also render him liable for income taxes on any payments discharging the continuing obligation. *Helvering* v. *Leonard*, 310 U. S. 80; *Weir* v. *Commissioner*, 109 F. (2d) 996 (C. C. A. 3d) certiorari denied, 310 U. S. 637; *Barbour* v. *Commissioner*, 110 F. (2d) 660 (C. C. A. 3d) certiorari denied, 310 U. S. 628; *Glendinning* v. *Commissioner*, 97 F. (2d) 51 (C. C. A. 3d); *Alsop* v. *Commissioner*, 92 F. (2d) 148 (C. C. A. 3d), certiorari denied, 302 U. S. 767.

Until recently the Government contended that

all payments which operate to discharge the taxpayer's obligation, whether or not that obligation could be altered in any way, or whether or not it was fortified by a contingent liability to make up deficiencies, were income to the obligor. See brief for the petitioner in *Helvering* v. *Fitch,* 309 U. S. 149, No. 243, October Term, 1939, p. 15. However, the rule of *Douglas* v. *Willcuts,* as clarified by recent decisions of this Court, is not so extensive. See *Helvering* v. *Fitch,* 309 U. S. 149; *Helvering* v. *Fuller,* 310 U. S. 69; *Helvering* v. *Leonard,* 310 U. S. 80. In the *Fuller* case this Court specifically rejected the argument of the Government that the income of a trust created by a taxpayer in conjunction with a divorce proceeding is taxable to the husband merely because it discharged his obligation of support, whether or not he could be required to add to the amounts going to his former wife. This Court found the law of Nevada, where the divorce in that case was obtained, to be that a wife could not obtain additional support from her former husband after he has created a trust required by the decree or by an agreement incorporated in the decree, unless such agreement or decree expressly reserved the power to alter. The husband was said to be "completely discharged" when he established the trust. Consequently, the avails did not operate to discharge any obligation; whatever obligation existed was discharged when

the trust was originally created. These recent decisions of this Court have established that a divorced husband must report income from alimony trusts and the like only if such income discharged continuing liability created by contract or state law. If no such continuing liability exists, the income is that of the wife, who physically receives the payments.

2. In the instant case, as held by the Board in Mr. Pearce's case, *Douglas* v. *Willcuts* is inapplicable. Mr. Pearce abandoned the trust which was originally established and, exercising the privilege accorded by the mutual agreement executed prior to the divorce, purchased an annuity for a single lump sum payment. The agreement provided that, upon the purchase of an annuity, he would be completely discharged of all obligation to contribute to the support of the petitioner. (R. 20–21.) Therefore, there was no continuing liability arising out of the contract between the parties. Cf. *Commissioner* v. *Tuttle*, 89 F. (2d) 112 (C. C. A. 6th); *Helvering* v. *Leonard*, *supra*; *Weir* v. *Commissioner*, *supra*; *Barbour* v. *Commissioner*, *supra*; *Glendinning* v. *Commissioner*, *supra*; *Alsop* v. *Commissioner*, *supra*.

The situation herein would have been no different had Mr. Pearce turned over to the petitioner the sum of $82,953.50, the amount of the premium that he paid, and then Mrs. Pearce had purchased

the annuity on her own initiative. The payments received by Mrs. Pearce from such an annuity purchased by her would not have been included in Mr. Pearce's income, for they could hardly be said to be intended as a discharge of an existing obligation. The lump sum payment would have been made for that purpose. The purchase of an annuity for another is more like the transfer of a lump sum than the creation of a trust for the devotion of future income to discharge an obligation or fulfill some other purpose. It was as though Mr. Pearce had bought an income bearing security and given it to his wife. He would not be required to include such income in his return. See *Helvering* v. *Fuller*, 310 U. S. 69, 74.[1]

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[1] In attempting to enact into the Revenue Act of 1941 a uniform method of taxing the proceeds of divorce and separation settlements, the Senate included a provision that specifically taxed such payments as are involved herein as part of the income of the divorced wife who actually received them. Section 117 (a) of Revenue Act of 1941, as introduced in the Senate on September 2, 1941. The operation of the provision was illustrated in part as follows (S. Rep. 673, 77th Cong., 1st Sess., p. 33): "(4) A divorce decree requires Mr. D to pay to Mrs. D, his former wife, $500 a month. To meet this obligation, Mr. D purchases an annuity for the life of his divorced wife which will pay her $500 a month. Under the provisions of section 22 (k) and notwithstanding the provisions of section 22 (b) (2), the full $500 a month received by Mrs. D is includible in her gross income and no part of such amount is includible in the gross income of Mr. D or deductible by him from his gross income." The entire provision was deleted in conference with the understanding that it would be considered later in a bill intended to deal with administrative matters. H. Rep. 1203, 77th Cong., 1st Sess., p. 11.

3. By sending a deficiency letter to the petitioner, the Commissioner placed upon her the burden of showing that she did not owe the taxes claimed. This she could do by demonstrating that the payments on which they were based came to her in discharge of her former husband's continuing obligation of support. The burden of proving this effect of the payments was hers (*Welch* v. *Helvering*, 290 U. S. 111, 115), and failure of proof meant that she must lose her appeal. To sustain her burden, she had to show "by clear and convincing proof" that her former husband remained liable to contribute further to her support during the taxable years involved. Cf. *Helvering* v. *Fitch, supra.* The Board found that she failed to do this, and sustained the Commissioner's determination. The court below agreed that she failed to sustain her burden of demonstrating to it that Texas law imposed a continuing liability on her husband. Her failure is illustrated by the agreement of all the judges that the law of Texas was left uncertain. Perforce, affirmance of the Board's decision for the Commissioner followed from this conclusion.

However, the petitioner, supported by the dissenting opinion of Judge Learned Hand, argues that *Helvering* v. *Fitch, supra,* means that the husband is to be taxed on the income from an alimony trust or its equivalent unless there is clear and convincing evidence that the particular financial settlement effected a complete discharge of

his obligation to support his former wife. (Br. 6.) This argument assumes the existence of a presumption of continuing obligation, so that the "general rule" would be that *Douglas* v. *Willcuts* applied to every divorce settlement unless the contrary were shown affirmatively. The husband's inability to dispel uncertainty as to the local law would then amount to a failure to overcome this presumption and would mean that the husband pays the taxes.

This interpretation of the *Fitch* case is erroneous. The taxpayer there was the husband, and it was *his* burden to show that the Commissioner's determination of a deficiency in his taxes was wrong.[2] Whatever presumption existed applied only to the correctness of the Commissioner's determination. Such a presumption in that case had the effect of imposing on the *husband* the burden of showing, by clear and convincing proof, that he was completely discharged. The same presumption in the instant case, where the *wife* is the taxpayer, imposes on her the burden of showing that the husband was not completely discharged, in order to relieve her of the taxes claimed by the Commissioner. In *Helvering* v. *Leonard* this Court stated (310 U. S. at 86) that:

> In *Helvering* v. *Fitch, supra,* we stated that where the *divorced husband* desires to avoid the general rule expressed in *Douglas* v. *Willcuts, supra,* he carries a distinct burden

[2] The Commissioner's position in the *Fitch* case was based on a determination that under Iowa law Mr. Fitch was not completely discharged.

> of establishing not by mere inference and conjecture but by "clear and convincing proof" that local law and the alimony trust have given him a full discharge. * * * (Italics supplied.)

The taxpayer's argument overlooks the importance of the fact that this Court was dealing with a divorced *husband* in quoting from the *Fitch* case. If the words "divorced wife" were inserted in place of "divorced husband", the remainder of the quotation would also have to be changed. A divorced wife, as in the instant case, would be unlikely to desire to "avoid the general rule expressed in *Douglas* v. *Willcuts*", because such avoidance would result in application of the even broader rule that the actual recipient of income—here, the wife—must pay the tax. Therefore, if this Court agrees with the court below that only "doubt and uncertainty" appear in response to the question of Mr. Pearce's continuing obligation, under the rule of the *Fitch* case the decision herein should be declared correct. Of course, if the uncertainty is changed to certitude that Mr. Fitch was fully discharged, the decision would *a fortiori* have to be affirmed.

4. When the instant case was before the Board of Tax Appeals, the appeals of both the petitioner herein and her former husband were presented simultaneously. The Commissioner, for his own protection, had asserted deficiencies against both, including in the income of each the same pro-

ceeds of the annuity. It was conceded, however, that only one of them was liable for the taxes thereon. The Commissioner suggested that the payments should be deemed income to Mrs. Pearce and not to her former husband. (R. 25.) The Board agreed with this view.

In presenting the case to the Board, each taxpayer had the burden of overcoming the presumptive correctness of the Commissioner's determination of his or her deficiency. However, the success of one of the taxpayers in this respect could only spell the failure of the other, since clearly one—but only one—had to report this income. The Board held that *Douglas* v. *Willcuts* did not apply. The result was to decide Mr. Pearce's action in his favor and to hold for the Government against Mrs. Pearce. *Pearce* v. *Commissioner,* unreported memorandum opinion entered June 14, 1940; (R. 24–26). On two grounds this result seems amply justified in this case: first, that the applicable state law is not clear and convincing, and second, that, if any rule can be gleaned from the Texas authorities, it is that Mr. Pearce was completely discharged when he purchased the annuity.

II

MR. PEARCE WAS NOT UNDER A CONTINUING LIABILITY TO CONTRIBUTE TO THE PETITIONER'S SUPPORT

Both Mr. and Mrs. Pearce were living in New York before the divorce was granted and again

during the years involved in this proceeding. (R. 8, 9.) The divorce was obtained in Texas. Consequently, the law of both states is material to a determination of whether there exists a continuing liability to support.

1. In New York Mr. Pearce's status was that of an unmarried man, divorced from his wife by a valid decree of a court of another state. Only if the courts of New York could require such a man to support his former wife was there any possibility of a continuing obligation with respect to the law of that state. Clearly, there is no such power. See *Kroner* v. *Kroner*, 23 N. Y. Supp. (2d) 670 (Dom. Rel. Ct.). But see *Riemer* v. *Riemer*, N. Y. City Ct., Kings Co., N. Y. L. J., May 4, 1940, p. 2047. The New York Civil Practice Act, which contains the provisions for support in connection with divorce proceedings, and the New York Public Welfare Law (McKinney, Vol. 47B) and the Domestic Relations Court Act of the City of New York (McKinney, Criminal Code, Vol. 66, pp. 1375–1448), which prescribe general rules of family support, have no references to such liability.

The decree of the Texas court that granted the divorce in this case contains no provision for support or division of property. Although New York courts retain power to require a former husband to contribute to his divorced wife's support at any time, notwithstanding the failure to include such an order in the original decree, their power extends

only to divorces granted by courts in that state. Civil Practice Act, Section 1170. The effect of this section is to include in every decree of divorce entered by New York courts a reservation of the right to increase or decrease the amount of support accorded the wife. *Fox* v. *Fox,* 263 N. Y. 68, 70. See also *Helvering* v. *Leonard,* 310 U. S. 80. The various other statutes in New York relating to support contain no reference to a divorced wife. Cf. New York Public Welfare Law, (McKinney, Vol. 47B) Section 128; Domestic Relations Court Act of the City of New York, Sec. 91 (McKinney, Vol. 66, p. 1416); *Milone* v. *Milone,* 160 Misc. 830 (N. Y. Dom. Rel. Ct.). The absence of such provisions may be contrasted with the power of New York courts to require a man to support his children regardless of his status respecting his wife. See *Mallina* v. *Mallina,* 167 Misc. 343 (N. Y. Dom. Rel. Ct.).

State courts have no power to order the support of a divorced wife if such act would amount to a refusal to give full faith and credit to a final and valid decree of a court in another state. *Yarborough* v. *Yarborough;* 290 U. S. 202. The judgment of the court of one state requiring alimony payments by a husband must be enforced, when sued upon in another state. *Sistare* v. *Sistare,* 218 U. S. 1. Conversely, a decree of divorce which, like the one herein, contains no provision for support of the wife cannot be, in effect, amended by a court in another state imposing such an obliga-

tion.[3] Therefore, Mr. Pearce was under no liability, through any possible action of the courts of New York, to add to the amount he had paid for the annuity he bought for his wife's support.

2. The brief for the petitioner draws upon "mere inferences and vague conjectures" to support the argument that, under Texas law, Mr. Pearce was subject to a continuing liability to contribute to the petitioner's support. But the decisions indicate that a decree of divorce in Texas cannot be amended and warrant the conclusion that no order to support could ever be appended to the simple judgment of divorce appearing in this record. (R. 11–12.) Since this judgment contained no division of the property of the parties or order requiring Mr. Pearce to contribute to the petitioner's support, any later judgment effecting such division or imposing such a duty would be tantamount to the entry of a new judgment. The Texas court would have no power to do this. See *Cannon* v. *Cannon,* 43 S. W. (2d) 134 (Civ. App., San Antonio), error dismissed, 121 Tex. 634. The law respecting the power of Texas courts to alter the provisions for support in a divorce decree appears to have been stated in *Phillips* v. *Phillips,* 203 S. W. 77 (Civ. App., Ft. Worth). In that case a husband succeeded in having a judgment of di-

[3] If there were a common law or statutory duty to support a divorced wife, the New York courts might order it despite the silence of the court granting the divorce in another state. Cf. *Laumeier* v. *Laumeier,* 237 N. Y. 357.

vorce reopened and the division of the parties' property set aside because the husband had not received proper notice of the proceedings. This was like reopening a judgment because of fraud or misrepresentation (see, e. g., *Ralls* v. *Ralls*, 256 S. W. 688 (Civ. App., Amarillo), error dismissed, 115 Tex. 617), and is not the type of reopening or amending which this Court considered in the *Fitch, Leonard* and *Fuller* cases. Cf. *Helvering* v. *Leonard*, 310 U. S. 80. They were concerned only with the power of the local courts to alter or amend after entry of a valid judgment or decree. With respect to such power, the court in the *Phillips* case made the following remark (p. 79):

> In this state the legal duty of the husband to support his wife ceases upon the severance of the marital bonds, nor has a court the power to decree that a husband or his property may be subjected to such support after divorce. Permanent alimony is not provided for by Texas statutes.

The only source of authority for the granting of any support to a divorced wife in Texas is Article 4638 of the present Revised Civil Statutes, which has been unchanged during all the time involved herein.[4] See Vernon's Texas Civil Statutes, Vol.

[4] The Texas statute is strikingly similar to the Nevada law which was before this Court in *Helvering* v. *Fuller*, 310 U. S. 69. Sections 9463 and 9465 of Nevada Compiled Laws, 1929. These sections were found to mean that a divorced wife's allowance once made is final, unless the power to amend was reserved by the decree or the settlement.

13, Art. 4638; Revised Civil Statutes of Texas (1911), Art. 4634. This article states that the court may order "a division of the estate of the parties in such a way as the court shall deem just and right, having due regard to the rights of each party and their children, if any." There is no power to grant alimony to be paid after the divorce has been granted.[5] *Ex parte Guinn,* 121 Tex. 66; *Pape* v. *Pape,* 13 Tex. Civ. App. 99, error dismissed, 93 Tex. 716; *Boyd* v. *Boyd,* 22 Tex. Civ. App. 200. See also *Ogg* v. *Ogg,* 165 S. W. 912, 913 (Civ. App., San Antonio); *Phillips* v. *Phillips, supra; Cunningham* v. *Cunningham,* 120 Tex. 491. Although alimony may be allowed during the pendency of the suit (Art. 4637), the power is strictly limited to that situation. *Martin* v. *Martin,* 17 S. W. (2d) 789 (Com. App., Sec. A). The taxpayer's brief (p. 12) cites other cases which involve the payment of a monthly or annual sum to the wife. However, in those cases the courts expressly deny that they are granting alimony. The judgments merely give effect to an equitable and convenient division of the parties' property, and the payments are to be made only out of the income from the property interests of the husband. See, e. g., *Berg* v. *Berg,* 115 S. W. (2d) 1171, 1172 (Civ. App., Ft. Worth),

[5] *Wiley* v. *Wiley,* 33 Tex. 358, decided in 1870, seems to conflict with the rule stated in the later cases, although possibly the alimony there granted was actually a charge only against the husband's property, and not a debt.

error dismissed, 129 Tex. 672; *Keton* v. *Clark*, 67 S. W. (2d) 437, 440–441 (Civ. App., Waco), error refused, 123 Tex. 636; *Clark* v. *Clark*, 35 S. W. (2d) 189, 190 (Civ. App., Waco), error dismissed, 121 Tex. 637. Of course, if the parties agree between themselves that the division of property shall take the form of periodic payments, and such agreement is approved by the court, it will be enforced. See *Johnson* v. *Johnson*, 14 S. W. (2d) 805 (Com. App., Sec. B); *Levy* v. *Goldsoll*, 62 Tex. Civ. App. 257, (5th Dist.), error refused, 62 Tex. Civ. App. 262. No installment payments were involved in *Scannell* v. *Scannell*, 117 S. W. (2d) 538 (Civ. App., Ft. Worth), and *Daniel* v. *Daniel*, 30 S. W. (2d) 801 (Civ. App., Ft. Worth).

Such an agreement may be altered to conform to the parties' true intention, if necessary, but this power does not extend to amendment at the instance of one party or on the court's initiative. *Keller* v. *Keller*, 135 Tex. 260.

The petitioner's brief cites no cases in which Texas courts have made or revised a division of property or an allowance for support after the divorce action has been finally closed and judgment rendered. It is believed that no such cases can be found in the Texas reports.

The common property of the husband and wife, not divided in the first instance, has been par-

titioned after divorce actions were closed, but these cases do not indicate that the courts indefinitely retain power to alter decrees. See *Gray* v. *Thomas,* 83 Tex. 246, 18 S. W. 721; *Whetstone* v. *Coffey,* 48 Tex. 269. In both these cases a wife was permitted to assert rights in community property which had not been divided at the time of the divorce.[4] See also *Kirberg* v. *Worrell,* 44 S. W. (2d) 940 (Com. App. Sec. A); *Keller* v. *Keller,* 135 Tex. 260 (Com. App., Sec. B). In *Keton* v. *Clark, supra,* the court found it unnecessary to decide whether or not a trial court could reserve the power to modify or discontinue stipulated monthly payments to be made out of the income from the husband's property. (67 S. W. (2d) p. 441.) The trial court in that case had refused to make any such alteration. Since the trial court in the instant case made no allowance for support, or division of property, it seems clear that it would have no power to do so at any future time. See *Whiteselle* v. *Northwestern Mut. Life Ins. Co.,* 221 S. W. 575, 576 (Com. App. Sec. B), where the court stated that a wife should assert all her claims to the husband's property during the divorce action or be satisfied with the division then made.

[4] Since there was no community property in the instant case, these authorities are clearly irrelevant.

The instant case should not be confused with cases involving the support and custody of children. Texas courts now hold that an award for the support of children may be amended at any time after it has been granted in a divorce proceeding. See *Wilson* v. *Underhill*, 131 S. W. (2d) 19 (Civ. App., Dallas); *Lacy* v. *Lacy*, 122 S. W. (2d) 1104 (Civ. App., Dallas); *Townsend* v. *Townsend*, 115 S. W. (2d) 769 (Civ. App., Dallas). These cases arose under Article 4639a of the Revised Statutes, which expressly gives the divorce court the power to alter or change judgments for the support of children. It is significant that previous to the enactment of this article the courts had the power to require the divorced father to support the children, but did not have the power to alter such a judgment or to allow support after the divorce action was closed. See *Bowyer* v. *Bowyer*, 130 Tex. 257 (Com. App., Sec. B), and *Cunningham* v. *Cunningham*, 120 Tex. 491. A similar rule still appears to exist in cases, like the one at hand, involving the support of the wife alone.

The petitioner has cited *Cannon* v. *Cannon*, 43 S. W. (2d) 134 (Civ. App., San Antonio), error dismissed, 121 Tex. 634, as an indirect authority for the proposition that a lower Texas court retains jurisdiction to alter a decree dividing the property of the parties after the case has been

closed. She maintains that at least it makes the question doubtful. The effect of doubt and uncertainty has already been discussed hereinabove.

Moreover, the *Cannon* case does not actually throw doubt on the question. There the former wife sought to have a divorce judgment amended in order to include certain stock in the inventory of property to be divided. The Court of Civil Appeals held that there was no jurisdiction to render a new judgment granting the request. Subsequently, another division of the Court of Civil Appeals explained the ruling by stating that the wife had attempted to correct a judicial rather than a clerical error, which was improper. *Bell* v. *Rogers,* 58 S. W. (2d) 878, 879–880 (Civ. App., Waco). At any rate, the *Cannon* case is a final judgment holding that the divorce decree could not be amended as requested. Such a judgment is binding on federal courts in interpreting state law. *Fidelity Trust Co.* v. *Field,* 311 U. S. 169; *Six Companies* v. *Highway Dist.,* 311 U. S. 180; and *West* v. *A. T. & T. Co.,* 311 U. S. 223.

The petitioner maintains that the action of the Supreme Court of Texas in dismissing the writ of error sought in the *Cannon* case throws doubt on the rule stated because it was tantamount to a disapproval of the reasoning of the Court of Civil Appeals, while indicating approval of the result reached. The Supreme Court noted that the writ

was "Dismissed for want of jurisdiction, April 6, 1932" (121 Tex. 634), which could have meant either disagreement with the reasoning below while approving the result, or a holding that the Supreme Court actually lacked jurisdiction. Vernon's Texas Civil Statutes, Vol. 3, Art. 1728. This is confirmed by the adoption of a rule by the Supreme Court in 1939, stating that thereafter the court would indicate disagreement with the lower courts' reasoning in reaching a correct result by placing the following notation on the petition: "Dismissed, W. O. J.—Correct Judgment." *Insurance Co.* v. *Ind. School Dist.*, 133 Tex. 545; *Wood* v. *Bankers Life & Loan Ass'n*, 132 Tex. 505. Before the adoption of this rule, the court was using the notation "Dismissed for want of jurisdiction" for cases in which it actually had no jurisdiction as well as the former type, those in which it disapproved the reasoning. It is more probable that the court dismissed the writ in the *Cannon* case because it actually lacked jurisdiction than because of disagreement with the reasoning below, since the Supreme Court of Texas could not grant a writ of error in divorce cases. Vernon's Texas Civil Statutes, Vol 4, Art. 1821, subdivision 3;[1] *Burguieres* v. *Farrell*, 126 Tex. 209. Therefore, if

[1] The Supreme Court may, however, answer questions certified by the Court of Civil Appeals in all cases. Vernon's Texas Civil Statutes, Vol. 4, Art. 1851. See *Hedtke* v. *Hedtke*, 112 Tex. 404.

the *Cannon* case is deemed in point, it supports the contention of the Commissioner rather than the petitioner.

CONCLUSION

The petitioner was correctly held liable for income taxes on the annuity payments which she received. The decision below should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 306.—October Term, 1941.

Josephine S. Pearce, Petitioner, vs. Commissioner of Internal Revenue. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 9, 1942.]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner and her husband separated in 1913. There was an agreement providing for monthly payments by the husband for her support. That agreement was amended in 1916 so as to provide monthly payments to her of $500 for life. Her husband, however, was given an option to terminate the arrangement by purchasing an annuity contract from a life insurance company which would pay petitioner $500 a month for the rest of her life. In 1917 petitioner obtained an absolute divorce in Texas, her husband entering a personal appearance. Neither alimony nor a property settlement was mentioned in the divorce decree. There were no children. Several months after the divorce Mr. Pearce purchased an annuity from an insurance company for petitioner's benefit. The annuity provided for a payment of $500 per month during her life.

Neither petitioner nor Mr. Pearce included the $6000 received by her under the annuity contract in their federal income tax returns for 1935 and 1936. The Commissioner sent deficiency notices to both of them. Each appealed to the Board of Tax Appeals. At the hearing the Commissioner contended that the payments were income of petitioner. The Board upheld that contention. 42 B. T. A. 91. The Circuit Court of Appeals affirmed the judgment of the Board, one judge dissenting. 120 F. 2d 228. We granted the petition for certiorari because of the manner in which that court applied the rule of *Helvering* v. *Fitch*, 309 U. S. 149, and *Helvering* v. *Leonard*, 310 U. S. 80, in case the ex-wife rather than the husband was sought to be taxed on alleged alimony payments.

The Circuit Court of Appeals reached the conclusion that petitioner was liable by the following line of reasoning. The determination of the Commissioner that the monthly payments were income of petitioner was presumptively correct; the burden to show error rested on petitioner. *Welch* v. *Helvering*, 290 U. S. 111, 115. Error might be shown by submitting "clear and convincing proof" (*Helvering* v. *Fitch*, *supra*, p. 156) that the payments were made pursuant to a continuing obligation of her former husband to provide for her support, so as to make the rule of *Douglas* v. *Willcuts*, 296 U. S. 1, applicable. The burden of establishing error is not sustained by a divorced wife merely by showing that an obligation of her former husband might have continued despite the divorce. Since it is doubtful and uncertain under Texas law whether petitioner's former husband was discharged of his marital obligation by the settlement in question, petitioner failed to show that the presumptively correct determination that she was liable was erroneous.

We do not think that that was a correct application of the rule of the *Fitch* and *Leonard* cases. Those cases hold that the income is taxable to the former husband not only where it is clear that payments to his ex-wife were made pursuant to a continuing liability created by his contract or by local law but also where his undertaking or local law makes that question doubtful or uncertain. Those cases, like *Douglas* v. *Willcuts*, *supra*, involved situations where the divorced husband was sought to be taxed on payments to his ex-wife. But the rule which they express supplies the criteria for determining, in absence of a different statutory formula, whether payments received by the ex-wife are properly taxable to her or to her divorced husband. If the Commissioner proceeds against the ex-wife, she sustains her burden of rebutting his presumptively correct determination merely by showing doubts and uncertainties as to whether the payments were made pursuant to her former husband's continuing obligation to support her. If the Commissioner proceeds against her former husband he sustains his burden by submitting clear and convincing proof that the payments were not made pursuant to any such continuing obligation. *Helvering* v. *Fuller*, 310 U. S. 69. The other course would make the liability of the divorced wife or the divorced husband wholly dependent on the election of the Commissioner to proceed against one rather than the other where, for example, local law was uncertain. But the

rule of *Douglas* v. *Willcuts, supra,* rests on a more substantial basis. Its roots are in local law and the undertakings of the husband. It calls for the use of the same criteria whether the husband or the wife is sought to be taxed.

We think, however, that petitioner has not maintained her burden in this case. Her former husband was not under a continuing contractual obligation to contribute to her support. For the agreement made in 1916 provided for the termination of his personal obligation to make payments to her in the event that he purchased the designated annuity. And so far as Texas law is concerned, she has not maintained her burden. Her showing as to Texas law is illustrated by the following.

By statute in Texas alimony may be awarded during the pendency of a suit for a divorce "until a final decree shall be made in the case". 13 Vernon's Civil Stats., Art. 4637. "This statute is exclusive in its very nature, and no alimony can be decreed by any court in this state except under its express terms." *Martin* v. *Martin,* 17 S. W. 2d 789, 791-792. It has been broadly stated in *Phillips* v. *Phillips,* 203 S. W. 77, 79 that, "In this state the legal duty of the husband to support his wife ceases upon the severance of the marital bonds, nor has a court the power to decree that a husband or his property may be subjected to such support after divorce. Permanent alimony is not provided for by Texas statutes." And see *Pape* v. *Pape,* 13 Tex. Civ. Rep. 99; *Boyd* v. *Boyd,* 22 Tex. Civ. Rep. 200. It is, however, provided by statute that the divorce court shall order "a division of the estate of the parties in such a way as the court shall deem just and right, having due regard to the rights of each party and their children, if any." 13 Vernon's Civil Stats., Art. 4638. That power extends not only to community property but to the separate property of the husband. *Ex parte Scott,* 133 Tex. 1; *Clark* v. *Clark,* 35 S. W. 2d 189; *Berg* v. *Berg,* 115 S. W. 2d 1171; *Keton v. Clark,* 67 S. W. 2d 437. At times the divorce court has made such a division of the estate as apparently to impose on the husband a personal obligation to make stated payments to his wife. *Wiley* v. *Wiley,* 33 Tex. 358. Furthermore, a divorce decree which does not settle the rights of the parties to community property may not preclude a subsequent suit by the wife to establish her rights in it. See *Gray* v. *Thomas,* 83 Tex. 246. And the decree may be corrected to conform to the intention of the parties. *Keller* v. *Keller,* 135 Tex. 260. The power of the court to modify a property settlement previously approved, so as to

give the wife an interest in property not covered by the earlier decree, has been denied in absence of fraud or mistake. *Cannon* v. *Cannon*, 43 S. W. 2d 134. Petitioner challenges the reliability of the latter case because on appeal the case was dismissed for want of jurisdiction (121 Tex. 634), which meant either disagreement with the reasoning but approval of the result, or lack of jurisdiction. 3 Vernon's Civil Stats., Art. 1728. And see *Republic Ins. Co.* v. *School Dist.*, 133 Tex. 545.

We need not, however, endeavor to resolve that doubt. Nor need we speculate as to the power of the court at some future time to order a division of property in this case and as an incident thereto to impose on petitioner's husband a personal obligation as was apparently done by the divorce decree in *Wiley* v. *Wiley, supra*. See 6 Tex. L. Rev. 344 discussing *Helm* v. *Helm*, 291 S. W. 648. For even though petitioner established that the divorce court retained that broad power, not specifically reserved, and even though we assume that the power to make a division of property is the equivalent of a power to provide permanent alimony, she has not maintained her burden of rebutting the presumptively correct determination of the Commission that the income from this annuity contract was taxable to her. In order to maintain that burden she would have to show that it was at least doubtful and uncertain whether the Texas court, as an incident of its power to require the husband to support his wife, retained control over this annuity contract or the income from it. That at least is the result unless we are to broaden the base on which the *Fitch*, *Fuller*, and *Leonard* cases rest.

Those cases involved so-called alimony trusts. In each the trust was irrevocable. In each the husband had an obligation to support his wife.

In the *Fitch* case the trust provided that the wife was to receive during her life $600 a month from the income of the trust property; the husband, the balance. We held that the husband had not shown by "clear and convincing proof" that "in Iowa divorce law the court has lost all jurisdiction to alter or revise the amount of income payable to the wife from an enterprise which has been placed in trust. For all that we know it might retain the power to reallocate the income from that property even though it lacked the power to add to or subtract from the corpus or to tap other sources of income. If it did have such power, then it could be said that a decree approving an alimony trust of the kind here involved merely placed upon the pre-existing duty of the husband a par-

ticular and specified sanction." 309 U. S. at p. 156. And in speaking of the alimony trust involved in *Douglas* v. *Willcuts, supra,* we stated (pp. 151-152):

"It is plain that there the alimony trust, which was approved by the divorce decree, was merely security for a continuing obligation of the taxpayer to support his divorced wife. That was made evident not only by his agreement to make up any deficiencies in the $15,000 annual sum to be paid her under the trust. It was also confirmed by the power of the Minnesota divorce court subsequently to alter and revise its decree and the provisions made therein for the wife's benefit. Likewise consistent with the use of the alimony trust as a security device was the provision that on death of the divorced wife the corpus of the trust was to be transferred back to the taxpayer."

In the *Leonard* case income from the trust was to be paid to the wife for her life which together with income from other property was estimated at $30,000 a year. A separation agreement provided that the husband would pay his wife an additional $35,000 each year during her life so that her aggregate net income for the maintenance of herself and her children would be $65,000 a year. The separation agreement also provided that in the event the husband's ability to make the annual payment of $35,000 became impaired he might apply to a court for a reduction of his obligation of not less than $10,000 a year. We held that the husband had not sustained his burden of showing that "local law and the alimony trust" gave him "a full discharge" from his obligation to support his wife. 310 U. S., p. 86. The trust and the undertaking in the separation agreement were integral parts of an arrangement by which the "maintenance and support" of the wife "were secured". p. 85. We noted that it was not clear under New York law whether or not such a settlement could be remade by the court, though there was some authority which indicated that the divorce court's reserved power might be exercised "where the provision in the separate agreement, approved by the decree, is for support and maintenance". pp. 86-87. In view of that fact and the nature of the settlement, we concluded that the husband had not shown that the trust was not mere security for his continuing obligation to support his wife.

In the *Fuller* case it was clear under Nevada law that the court retained no control over the divorce decree which approved the trust settlement. Since there was no such reserved power and since the trust contained no contractual undertaking by the husband for

support of the wife, we concluded that his obligation to support had been *pro tanto* discharged. We held, however, that the husband was taxable on a $40 weekly payment which he had agreed to make to his wife. But that fact did not make him taxable on income from the trust also, since the provision for weekly payments and the trust "were not so interrelated or interdependent as to make the trust a security for the weekly payments." p. 73. We also noted (p. 76) that though "the divorce decree extinguishes the husband's preëxisting duty to support the wife, and though no provision of the trust agreement places such obligation on him, that agreement may nevertheless leave him with sufficient interest in or control over the trust as to make him the owner of the corpus for purposes of the federal income tax" under the rule of *Helvering* v. *Clifford*, 309 U. S. 331.

Thus a property settlement made for the purpose of maintaining or supporting the wife may be treated for income tax purposes as mere *security* for the husband's continuing obligation dependent on such considerations as whether it contains, or is interrelated with, contractual obligations of the husband for her support; whether the court has a reserved power to alter or modify it; or whether the husband retains any substantial interest in the property conveyed. Where the settlement carries some of the earmarks of a security device, then the power of the court to add to the husband's personal obligations may be especially significant. See *Helvering* v. *Leonard*, *supra*. But where, as here, the settlement appears to be absolute and outright and on its face vests in the wife the indicia of complete ownership, it will be treated as that which it purports to be in absence of evidence that it was only a security device for the husband's continuing obligation to support. There may be difficulty in placing a particular case on one side of the line rather than the other. But as stated by Mr. Justice Holmes in *Irwin* v. *Gavit*, 268 U. S. 161, 168, "That is the question in pretty much everything worth arguing in the law." And see *Harrison* v. *Schaffner*, 312 U. S. 579, 583.

As we have said, petitioner has made no showing whatsoever that the Texas court retained the power to reallocate the income from this annuity contract or to control it in any way as an incident of its power to require the husband to support the wife. She has not shown that the divorce court imposed any personal obligation on the husband in respect to the settlement in question. And she is not aided by those cases which enforce agreements of

the husband to make periodic payments to the wife. See *Johnson* v. *Johnson*, 14 S. W. 2d 805. There is no such agreement here. Proof that the Texas court might add to the husband's personal obligations as an incident to a future property settlement is no substitute for proof that the court had the power to remake this property settlement after it was consummated. Hence there is no ground for concluding that this settlement which is absolute on its face is mere security for an obligation of a husband to support his wife.

"The correct ground for refusing to tax such income to the husband is merely that it is the lump sum which discharges him and not the future income received by the wife." Paul, Five Years with *Douglas* v. *Willcuts*, 53 Harv. L. Rev. 1, 17, note 44. We noted in *Helvering* v. *Fuller*, *supra*, p. 74, that outright transfers of property to the wife, though providing for her maintenance and support, were no different from cases "where any debtor, voluntarily or under the compulsion of a court decree, transfers securities, a farm, an office building, or the like, to his creditor in whole or partial payment of his debt." We do not think that it would be proper to extend the rule of *Douglas* v. *Willcuts*, *supra*, to such a situation. The possibility that the divorce court might add to the husband's personal obligation does not alter the result. As in the *Fuller* case, the transfer of property to the wife might result only in a partial discharge of the husband's obligation. If the husband undertook, or was directed, to make other payments, he might be taxable on them. But the fact that he is taxable on a part of the payments received by the wife does not necessarily make him taxable on all. *Helvering* v. *Fuller*, *supra*, p. 73. Hence the statement in *Helvering* v. *Fitch*, *supra*, p. 156, that it must be clear "that local law and the alimony trust have given the divorced husband a full discharge and leave no continuing obligation however contingent" is to be read in light of the fact that the alimony trust in that case was deemed to be a mere security device for the husband's continuing obligation to support. For the husband was relieved from payment of the tax on income from the property settlement in the *Fuller* case though he had a continuing obligation to pay the wife $40 a week.

If the rule of *Douglas* v. *Willcuts*, *supra*, is not to be extended to this type of case, then on the showing which has been made the husband would have sustained his burden in case the Commissioner

had proceeded against him. Cf. *Mitchell* v. *Commissioner*, 38 B. T. A. 1336. Clearly then, the wife may not escape.

Such cases as *Helvering* v. *Horst*, 311 U. S. 112, *Helvering* v. *Eubank*, 311 U. S. 122, and *Harrison* v. *Schaffner*, *supra*, are not opposed to this result. Those cases dealt with situations where the taxpayer had made assignments of income from property. He was held taxable on the income assigned by reason of the principle "that the power to dispose of income is the equivalent of ownership of it and that the exercise of the power to procure its payment to another, whether to pay a debt or to make a gift, is within the reach" of the federal income tax law. *Harrison* v. *Schaffner*, *supra*, p. 580. But in those cases the donor or grantor had "parted with no substantial interest in property other than the specified payments of income". *Id.* p. 583. Here he has parted with the corpus. And "the tax is upon income as to which, in the general application of the revenue acts, the tax liability attaches to ownership." *Blair* v. *Commissioner*, 300 U. S. 5, 12. Finally, there is no barrier under the income tax laws to taxing the holder of an annuity on the income received, however his interest in the fund which produces the income may be described. Cf. *Irwin* v. *Gavit*, *supra*.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

MR. JUSTICE FRANKFURTER, dissenting.

The social fact that a husband is normally under a responsibility to provide for his wife even after they are divorced is the basis for the rule that monies received by a wife under a divorce settlement are presumed to be in discharge of a continuing obligation of the husband. I therefore agree with the decision of the Court to the extent that it reinforces this rule as a rule of policy, and not one of caprice varying with the sex of the taxpayer against whom the Commissioner chooses to proceed. I agree that if the Commissioner

proceeds against the wife, "she sustains her burden of rebutting his presumptively correct determination merely by showing doubts and uncertainties as to whether the payments were made pursuant to her former husband's continuing obligation to support her", and that if, on the other hand, the Commissioner determines that the payments are taxable to the husband, the latter sustains his burden only "by submitting clear and convincing proof that the payments were not made pursuant to any such continuing obligation." But I do not agree that the petitioner has failed to make the showing which is required under the rule professed by the Court.

Local law may provide that the transfer of property under a divorce settlement finally and definitively terminates a husband's obligation to support his wife, and that, once such a settlement is made, the wife loses her right to apply to a court for an order requiring the husband to support her. If the local law gives the settlement such effect, it is immaterial what the nature of the transferred property is. For in such a case the income derived from the property cannot be regarded as conferring any benefit upon the husband, and it is therefore taxable to the wife. On the other hand, local law may provide that even though a husband has made a complete, irrevocable transfer of property, he has nevertheless not obtained a full discharge of his marital obligations to his wife, and that, where circumstances in the future may warrant, a court can order the husband to make further contributions to her support. In such a case the husband is still under a "continuing obligation however contingent", *Helvering* v. *Fitch*, 309 U. S. 149, 156; *Helvering* v. *Leonard*, 310 U. S. 80, 84, and since the income received by the wife from the property contributes to her support and thus serves to discharge the obligation which under local law the husband still owes her, the income should be taxable to him. "The dominant purpose of the revenue laws is the taxation of income to those who earn or otherwise create the right to receive it and enjoy the benefit of it when paid." *Helvering* v. *Horst*, 311 U. S. 112, 119; and see *Harrison* v. *Schaffner*, 312 U. S. 579.

The fact that the wife may, years after the settlement, have to go to court for an order requiring the husband to make additional payments for her support is of no legal consequence if the husband may be required to make such payments. A legal obligation may continue even though its burden is contingent upon future judicial action. A wife's receipt of income from property settled

upon her may make it unnecessary to her ever to apply for a court order. But it does not follow that unless and until she goes to court for such an order, her husband is under no legal obligation to support her. If the income from the property should dwindle to the point where the wife can no longer maintain herself, and the law has continued its hold upon the husband so that he may be required to make further contributions to her support, then plainly the husband is still under a "continuing obligation however contingent". The determinative fact is that the law has continued its hold upon the husband, not that it has reserved the power to modify the particular settlement.

It is utterly immaterial whether the property transferred was an irrevocable trust, as in the *Fitch* and *Leonard* cases, or an annuity contract, as we have here. For the annuity is taxable income, *Irwin* v. *Gavit*, 268 U. S. 161, and the procurement, by the husband's purchase, of its payment to his wife renders the annuity taxable income to him if it is in discharge of his obligation, quite as much as if he had procured the payment by creating a trust of his property. *Harrison* v. *Schaffner, supra.*

In every case the decisive inquiry is whether the husband's obligation subsists after the divorce settlement, or whether, as a result of the settlement, he is quits of his wife, once and for all, for better or for worse. If he is under a continuing obligation, the property transferred, whether it be an irrevocable trust or an annuity contract, is a security device only in the sense that it operates to secure the fulfillment of the obligation. If the fact that the husband has divested himself of control over the transferred property were determinative, certainly the *Fitch* and *Leonard* cases, at least, would have been decided the other way. For in each of these cases the husband conveyed an absolutely irrevocable trust, over which he had no greater control than the husband has over the annuity in the case before us. These cases show that if a husband is under a continuing obligation to support his wife, income from the property is taxible to him not because he has retained any interest in or control over the property, but because the income discharges *pro tanto* a legal obligation which he owes and thus confers a taxable benefit upon him. The ultimate criterion of taxability, therefore, is not whether a state court has reserved power to control the property transferred by a husband under a divorce settlement, but whether "the court lacks the power

to add to his personal obligations". *Helvering* v. *Leonard*, 310 U. S. 80, 87.

In law as in life lines have to be drawn. But the fact that a line has to be drawn somewhere does not justify its being drawn anywhere. The line must follow some direction of policy, whether rooted in logic or experience. Lines should not be drawn simply for the sake of drawing lines.

The decisions of this Court dealing with the question before us have turned upon whether local law was uncertain as to the existence of a continuing obligation on the part of the husband to support the wife. The opinion of the Court now introduces another element, namely, whether the local law is uncertain as to the power of the state courts to remake the particular settlement. This, it seems to me, has no valid relation to the basic principle of tax liability that "he who receives benefits should be taxed". Whether a husband is benefited from the payment of monies to his divorced wife depends upon his obligation to her which the payment of the monies served to discharge, not upon the nature of the wife's interest in the property he has transferred to her. To introduce such an unwarranted refinement is to clog the administration of the revenue laws.

But, in any event, all of the judges of the Circuit Court of Appeals were agreed that "the law of Texas is uncertain as to whether the taxpayer's husband discharged himself of his marital liability by the settlement at bar." 120 F. 2d 228, 230. This general uncertainty as to Texas law is controverted now not by controlling Texas authority but by extended argumentation and speculation. The Court suggests that had the Commissioner gone against the husband, he would have sustained the burden as heretofore defined, namely of showing, "by submitting clear and convincing proof", that under local law he was under no continuing obligation. Support for the proposition is drawn not from any Texas authority, whether statute or decision, but from a decision of the Board of Tax Appeals, *Mitchell* v. *Commissioner*, 38 B. T. A. 1336. But in that case there was a division of property between husband and wife, which included property belonging to the wife under an earlier arrangement entirely unrelated to the husband's marital obligations. The Board held that the income from such property could not, therefore, be taxed to the husband. As its opinion shows, the decision did not turn on the Texas law of divorce: "We think that

the trust income which was paid to her [the wife] was her separate income. It was not paid in satisfaction of any legal obligation of J. A. Mitchell [the husband] and it is not taxable to him." 38 B. T. A. at 1342.

The Court's exegesis of Texas law shows it to be no less uncertain than was the Iowa law in the *Fitch* case or the New York law in the *Leonard* case. The effect of the Court's ruling that the wife, in order to escape tax liability, must clearly establish that the state court has reserved the power to modify the terms of the particular property settlement is to reject the rule of policy enunciated earlier in its opinion. For there is no clear Texas authority, and under the rule of the *Fitch* and *Leonard* cases, which the Court does not purport to modify, the husband would be unable to show, "not by mere inference and conjecture but by 'clear and convincing proof'" (*Helvering* v. *Leonard, supra,* at 86; see *Helvering* v. *Fitch, supra,* at 156), that the payments made to his wife did not discharge a continuing obligation which he owed her. Therefore, liability under the tax law is made actually to depend upon whether the Commissioner elects to go against the husband or the wife. Having closed the front door to determination of tax liability by caprice, the Court allows caprice to enter through the back door of "presumption".

We brought this case here in order to clarify an important question arising under the federal revenue laws, not to re-examine the correctness of the lower court's finding regarding the uncertainty of Texas law as applied to this case. The general uncertainty of Texas law with respect to control over divorce settlements is conceded—and that is the decisive factor for our purpose. The absence of specific Texas authority dealing with such an annuity settlement as we have here does not lessen or remove that uncertainty, or justify us in making assumptions regarding the Texas law affecting such a settlement. Where prophecy as to a state court's ruling on its local law is not imperatively required of us, experience counsels abstention from prophecy. No ruling of ours can make Texas law.

I believe therefore that the judgment below should be reversed because of the ruling on federal law as to which we all agree, and that Texas law should be left where the Circuit Court of Appeals found it.

The CHIEF JUSTICE joins in this dissent.